

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
San Diego Telephone Company, Inc.; San Diego	)	
Telecom, Inc.; Charles D. Hughen; and Ed Poe,	)	File No. EB-01-TC-F-005
	)	
Complainants,	)	
	)	
v.	)	
	)	
MCI WorldCom; WorldCom Network Services,	)	
Inc.; WorldCom Technologies, Inc.; and TTI	)	
National, Inc.,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 13, 2002**

**Released: June 24, 2002**

By the Commission:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we deny a formal complaint filed by San Diego Telephone Company, Inc. (SDT), San Diego Telecom, Inc. (SDT Telco), Charles D. Hughen (Hughen), and Ed Poe (Poe) (collectively Complainants) against MCI WorldCom, WorldCom Network Services, Inc., WorldCom Technologies, Inc., and TTI National, Inc. (collectively MCI WorldCom) under section 208 of the Communications Act of 1934, as amended (the Act).<sup>1</sup> This complaint was referred to the Commission by the Superior Court of the State of California under the doctrine of primary jurisdiction. The Complainants allege that MCI WorldCom switched the presubscribed long distance service providers of complainants Poe and Hughen from SDT to WilTel, an MCI WorldCom affiliate, without their authorization and without verification in violation of section 258 of the Act and the Commission's rules.<sup>2</sup>

2. We find that the Complainants have failed to meet their burden of proof. The Complainants have failed to produce evidence sufficient to support their allegations. Consequently, we conclude that the evidence before us does not demonstrate that complainants Poe and Hughen were slammed. Many of the issues raised by the Complainants in their brief are irrelevant to our analysis. Therefore, we will address only those issues we deem essential to a determination of whether the complainants were slammed.

<sup>1</sup> San Diego Telephone Company et al. v. MCI WorldCom et al., File No. EB-01-TC-F-005 (filed March 14, 2001) (Amended Formal Complaint).

<sup>2</sup> See 47 U.S.C. § 258; 47 C.F.R. § 64.1100 (a)-(d) (1997). This was the rule at the time of the conduct at issue here. The rule was amended on August 3, 2000 and codified at 47 C.F.R. § 64.1120. See also Amended Formal Complaint at 1.

## II. BACKGROUND

3. SDT and SDT Telco were California corporations doing business as switchless resellers of long distance telephone services provided by Brooks Fiber Properties, a facilities-based interexchange carrier (IXC).<sup>3</sup> Complainants Charles Hughen and Ed Poe were residential telephone subscribers of SDT long distance services.<sup>4</sup> Defendant MCI WorldCom is a facilities-based provider of interexchange services and successor in interest to Brooks Fiber Properties.<sup>5</sup>

4. On February 22, 1999, the Complainants filed suit against MCI WorldCom in the Superior Court of the State of California for the County of San Diego, Central Division, alleging, among other things, that MCI WorldCom, through WilTel, one of its subsidiaries, converted the interexchange service of Poe and Hughen in violation of section 258 of the Telecommunications Act of 1996.<sup>6</sup> On April 30, 1999, the Superior Court of California issued an order staying the underlying civil litigation and referring to the Commission the issue of whether MCI WorldCom slammed complainants Poe and Hughen.<sup>7</sup> In its order, the Court found that “plaintiff’s claims are all based upon alleged ‘slamming’” and the “FCC possesses the experience and expertise to resolve factual issues in this case.”<sup>8</sup>

5. To implement the court’s referral, complainants first filed an informal complaint with the Commission on July 20, 1999.<sup>9</sup> The Complainants then filed a formal complaint with the Commission on November 28, 2000. The complaint was dismissed because of several procedural deficiencies.<sup>10</sup> The Complainants then filed an Amended Formal Complaint on March 14, 2001.<sup>11</sup> The Complainants allege that MCI WorldCom slammed complainants Poe and Hughen in violation of section 258 of the Act when it acquired Brooks Fiber Properties.<sup>12</sup> According to the Complainants, when MCI WorldCom purchased Brooks, it submitted preferred carrier (PC) change orders to the local exchange carrier (LEC) using Brooks’ facilities.<sup>13</sup> The Complainants seek a determination that MCI WorldCom violated section 258 because the orders were submitted without the requisite subscriber authorization or verification.<sup>14</sup> MCI

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<sup>3</sup> Amended Formal Complaint at 2. The companies have since gone out of business.

<sup>4</sup> *Id.* at 2-3.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> We note that section 207 of the Act requires that any person claiming to be damaged by any common carrier must file a complaint at the Commission or file suit for the recovery of damages, for which such common carrier may be liable under the Act, in any district court of the United States of competent jurisdiction. *See* 47 U.S.C. § 207. The Complainants chose, however, to file their complaint in state court.

<sup>7</sup> Joint Statement at 3.

<sup>8</sup> *Id.*

<sup>9</sup> Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues at 4 (filed May 1, 2001) (Joint Statement).

<sup>10</sup> *See* Letter from William H. Davenport, Special Counsel, FCC to Norman B. Blumenthal and Kyle R. Nordrehaug, counsel for Complainants, Blumenthal Ostroff & Markham, dated December 7, 2000 (stating, for example, that the complaint fails to comply with section 1.721(a)(12) which requires that each copy of the complaint filed with the Commission contain a Formal Complaint Intake Form and that the complaint does not include a summary or table of contents as required by section 1.49(b)-(c)).

<sup>11</sup> *See* 47 C.F.R. § 1.728(a).

<sup>12</sup> Amended Formal Complaint at 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

WorldCom responds that Poe and Huguen each contacted the LEC to initiate the PC changes.<sup>15</sup>

### III. DISCUSSION

#### A. The Complainants Have Failed to Meet their Burden of Proof.

6. The Commission's formal complaint rules place the burden of pleading and documenting a violation of the Act on the complainant; they do not require the defendant to prove that it has not violated the Act.<sup>16</sup> As the Commission explained when it promulgated the rules governing formal complaint proceedings, "[f]ormal complaint proceedings, unlike court litigation or administrative trial-type hearings, are often resolved solely on the written pleadings. These pleadings must, therefore, stand on their own and provide the factual underpinnings for a decision on the merits."<sup>17</sup> Consequently, a formal complaint must contain copies of all affidavits, documents, data compilations, and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the complaint.<sup>18</sup> In addition, a complainant may file with the Commission and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories.<sup>19</sup>

7. As noted above, the Complainants base their claim on section 258 of the Act and our related rules. Section 258 states that "[n]o telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."<sup>20</sup> The goal of section 258 is to eliminate the practice of "slamming," which is the unauthorized change of a subscriber's preferred carrier. Our rules require that carriers follow one of the Commission's prescribed verification procedures before submitting carrier changes on behalf of subscribers.<sup>21</sup> The Commission has made

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<sup>15</sup> MCI WorldCom Answer at 17.

<sup>16</sup> See *American Message Centers v. FCC*, 50 F.3d 35, 41 (D.C. Cir. 1995) (citing *Amendment of Rules Governing Procedures to be Followed Where Formal Complaints are Filed Against Common Carriers*, Report and Order, 3 FCC Rcd 1806, 1806, ¶ 8 (1988)); see also 47 C.F.R. § 1.720; *Amendment of Rules Governing Procedures to be Followed Where Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22508, ¶ 22 (1997) (stating that "our ... objective is to improve the utility and content of pleadings, so that the complaint, answer, and any necessary reply may serve as the principal basis upon which the Commission will make a decision on the merits of the complaint").

<sup>17</sup> *Amendment of Rules Governing Procedures to be Followed Where Formal Complaints are Filed Against Common Carriers*, Report and Order, 3 FCC Rcd 1806, 1806, ¶ 8 (1988).

<sup>18</sup> See 47 C.F.R. § 1.721(a)(11). We note that, in contrast to the formal complaint rules, the informal complaint rules place a lesser burden on the complainant with regard to what must be contained in his or her slamming complaint. See 47 C.F.R. § 1.719.

<sup>19</sup> See *id.* § 1.729(a).

<sup>20</sup> 47 U.S.C. § 258.

<sup>21</sup> Pursuant to these procedures, carriers had to (1) obtain the subscriber's written authorization; (2) obtain confirmation from the subscriber via a toll-free number provided exclusively for the purpose of confirming orders electronically; (3) utilize an independent third party to verify the subscriber's order; or (4) send an information package with a postpaid card to deny, cancel, or confirm a service order. See 47 C.F.R. § 64.1100 (a)-(d) (1997). This was the rule at the time of the conduct at issue here. The rule was amended on August 3, 2000 and codified at 47 C.F.R. § 64.1120.

enforcement of these rules a high priority.<sup>22</sup>

8. Here, however, we find that the Complainants have submitted little support to substantiate the allegations underlying their complaint. While the Complainants did attach a variety of documents to their amended complaint, they did not explain how those documents supported their allegations.<sup>23</sup> Furthermore, Complainants' brief included and discussed only the affidavits of Poe and Hughen that asserted that they had not authorized their long distance service to be switched from San Diego Telephone to WilTel.<sup>24</sup> In fact, not only did the brief lack the other original attachments, it also lacked any discussion of how any of the documents supported the Complainant's allegations. The Commission's rules require that "[a] party shall attach to its brief copies of all documents, data compilations, tangible things, and affidavits upon which such party relies or intends to rely to support the facts alleged and legal arguments made in its brief and such brief shall contain a full explanation of how each attachment is relevant to the issues and matter in dispute."<sup>25</sup> Since the brief did not include any of the requisite attachments, explanations or legal arguments, the Commission's rules require it to assume that the Complainants no longer intend to rely upon the documents filed with the complaint.<sup>26</sup> Consequently, the unsubstantiated affidavits constitute the entire support for the allegations before the Commission.

9. Other evidence submitted by MCI WorldCom, however, contradicts these affidavits. MCI WorldCom has submitted Care Interface System (CIS) records from Pacific Bell indicating that, on September 21, 1998, Poe was a new customer who selected his IXC through his LEC, Pacific Bell.<sup>27</sup> Similarly, CIS records submitted by MCI WorldCom indicate that, on September 8, 1998, Hughen moved and contacted the LEC directly to order new service and to make a PC selection. In addition to the CIS records, MCI WorldCom submitted two letters, dated November 23, 1999, that MCI WorldCom had filed in response to the Complainants informal complaints.<sup>28</sup> Like the CIS records, those letters indicate that the Complainants' LEC, Pacific Bell, submitted orders to WilTel on behalf of Poe and Hughen.<sup>29</sup> More significantly, MCI WorldCom submitted Pacific Bell's responses to Poe and Hughen's informal

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<sup>22</sup> See *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508, 1511, ¶ 3, *reconsideration pending (Slamming Order)* (stating that the Commission recently has increased its enforcement actions to impose severe financial penalties on slamming carriers).

<sup>23</sup> Documents attached to the complaint include: Brooks Fiber Reseller Agreement; Affidavits from Poe and Hughen; an LOA for complainant Ed Poe showing his selection of SDT as his preferred carrier; three letters from MCI WorldCom to Brooks' resellers purportedly showing that MCI WorldCom made PC changes that were not supposed to result in a carrier change; and two Pacific Bell phone bills intending to show slamming charges billed to Poe and Hughen by WilTel. See SDT Amended Formal Complaint at 19-20.

<sup>24</sup> We note that the affidavit of complainant Poe did not contain an original signature.

<sup>25</sup> See 47 C.F.R. § 1.732(b).

<sup>26</sup> Our rules state that claims and defenses previously made but not reflected in the briefs will be deemed abandoned. See 47 C.F.R. § 1.732(b).

<sup>27</sup> See MCI Answer Exhibits 2-3; see also MCI Brief at 17-19.

<sup>28</sup> See Letter from M. Christine Ayala, Customer Service Representative, MCI WorldCom to Analyst, FCC dated November 23, 1999; Answer Exhibit 4. See also Letter from M. Christine Ayala, Customer Service Representative, MCI WorldCom to Analyst, FCC, dated November 23, 1999; Answer Exhibit 5.

<sup>29</sup> *Id.*

complaints.<sup>30</sup> Each response includes a LEC report and a letter from Pacific Bell to the initial counsel for the Complainants indicating that Poe and Hughen's accounts were established through Pacific Bell with WilTel as the long distance carrier.<sup>31</sup>

10. In weighing the contradictory evidence submitted by the parties, we are not persuaded that the Complainants have satisfied their burden of proving that they were slammed. On one side, we consider the affidavits of Poe and Hughen, both interested parties. On the other, we consider not only MCI WorldCom's letters asserting that they received orders from Pacific Bell, but also the contemporaneous business records of Pacific Bell, which is not a party to this case, also indicating that Complainants ordered WilTel's service through Pacific Bell. In order to find for Complainants, who have the burden of proof, we would have to find their evidence more persuasive than the Defendant's evidence. Particularly in light of Complainants' misstatements of fact in this case,<sup>32</sup> however, we accord more weight to MCI WorldCom's letters and to Pacific Bell's contemporaneous business records than to Poe and Hughen's self-serving affidavits.<sup>33</sup>

11. The weight of the evidence indicates that both conversions were the result of a "LEC-initiated install" at the request of the complainants.<sup>34</sup> If, in fact, Poe and Hughen selected WilTel by directly contacting the LEC, then no verification would be necessary.<sup>35</sup> Thus, we are not persuaded that Poe and Hughen were slammed, and their complaint must be denied.

#### **B. Application for Review.**

12. On July 9, 2001, the Complainants filed an Application for Review of a discovery ruling

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<sup>30</sup> See Letter from V.J. Gordan, Manager, Pacific Bell to Norman Blumenthal, counsel for Charles Hughen, dated September 20, 1999; MCI Answer Exhibit 12. See also Letter from V.J. Gordan, Manager, Pacific Bell to Norman Blumenthal, counsel for Ed Poe, dated September 13, 1999; MCI Answer Exhibit 13.

<sup>31</sup> *Id.*

<sup>32</sup> For example, in arguing that their formal complaint was not time-barred, the Complainants state that it came to the Commission by order of the California state court. The Complainants argued that two previously filed informal complaints came to the Commission prior to the state court's referral. See Brief of San Diego Telephone Company (SDT) at ¶ 37. The record clearly indicates, however, that the informal complaints were filed on July 20, 1999, after, and apparently because of, the court's April 30, 1999 primary jurisdiction referral. In fact, the informal complaints filed by Poe and Hughen refer to the pending state court action. See MCI Answer Exhibit 6 at 2; see also MCI Answer Exhibit 7 at 2 ("[t]his action has been stayed pending the Commission's determination of slamming complaints..."). Also, in response to the Commission staff's May 3, 2001 inquiry regarding the scope of the complaint, the Complainants submitted a September 14, 2001 letter inaccurately asserting that they had explained to the Commission on "several occasions" that the complaint was limited to Poe and Hughen. See Letter from Neil Ende and Alexandre B. Bouton, counsel for the Complainants to Kimberly Jackson, Attorney, FCC at 2, dated September 14, 2001.

<sup>33</sup> Courts typically consider the interest of a witness in the case in weighing the reliability of his testimony. See, e.g., *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of America*, 933 F. Supp. 254, 259 (S.D.N.Y. 1996); *Uniroyal Goodrich Tire Co. v. Hudson*, 873 F. Supp. 1037, 1041 (E.D. Mich. 1994), *aff'd* 97 F.3d 1452. Moreover, contemporaneous written records are reasonably given more weight than a party's later testimony. See, e.g., *Skinner v. Secretary of Dept. of Health and Human Services*, 30 Fed. Cl. 402, 410 (1994) (In general, contemporaneous written records are to be given more weight than testimony adduced years later.).

<sup>34</sup> Joint Statement at 5.

<sup>35</sup> See *Slamming Order*, 14 FCC Rcd 1508, 1565, ¶ 93 (stating that "... in situations in which a customer initiates or changes long distance service by contacting the LEC directly, verification of the customer's choice would not need to be verified by either the LEC or the chosen IXC"). This order discusses the slamming rules that were in effect at the time of the alleged unlawful conduct.

made by Commission counsel.<sup>36</sup> Any person aggrieved by any action taken pursuant to delegated authority may file an Application for Review requesting review of that action by the Commission.<sup>37</sup> Furthermore, the Commission may deny an application without specifying any reasons for its action.<sup>38</sup> The Commission will not, however, entertain an Application for Review of an interlocutory staff ruling until there is a final ruling on the merits of the complaint.<sup>39</sup>

13. We now deny the Complainants' Application for Review. Under our rules, a complainant may file with the Commission and serve on the defendant up to ten interrogatories concurrently with its complaint.<sup>40</sup> Although the initial counsel for the Complainants elected not to file and serve such interrogatories, the staff exercised its discretion to allow the current counsel for the Complainants to file a Motion for Late-Filed Discovery by May 7, 2001.<sup>41</sup> Since the Complainants failed to meet the deadline by three weeks, we find that the staff's denial of the subsequently filed Motion for Late-Filed Discovery was reasonable.

#### IV. ORDERING CLAUSES

14. Accordingly, for the reasons stated above, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 207, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 207, 208, and the authority delegated or otherwise established in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the formal complaint filed by San Diego Telephone Company, Inc., San Diego Telecom, Inc., Charles D. Huguen, and Ed Poe IS DENIED.

15. IT IS FURTHER ORDERED that the Application for Review and Motion for Stay filed by the Complainants on July 9, 2001 ARE DENIED.

16. IT IS FURTHER ORDERED that all other outstanding motions in this case ARE DENIED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

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<sup>36</sup> San Diego Telephone Company, Inc. et al. Application for Review and Motion for Stay (filed July 9, 2001). The discovery ruling, which denied a Request for Late-Filed Discovery, was issued pursuant to delegated authority by Telecommunications Consumers Division Staff Attorney, Kimberly Jackson, during a conference call on June 6, 2001 and later memorialized by letter dated June 8, 2001. *See Letter Ruling*.

<sup>37</sup> 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(a).

<sup>38</sup> 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(g).

<sup>39</sup> *See Halprin, Temple, Goodman, and Sugrue v. MCI Telecommunications Corp.*, 13 FCC Rcd 22568, 22583-84 (1998); *see also In the Matter of Implementation of the Telecommunications Act of 1966, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Order on Reconsideration, 16 FCC Rcd 5681, 5697, ¶ 38. (2001).

<sup>40</sup> 47 C.F.R. § 1.729(a).

<sup>41</sup> *See Letter from Kimberly Jackson, Attorney, FCC, to Lisa Smith, Kecia Lewis, and Lisa Youngers, counsel for MCI WorldCom, Neil Ende, counsel for the Complainants, dated May 17, 2001 at 2 (memorializing oral rulings made during the initial status conference).*

Secretary